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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1928.

| | |
|---|---|
| ARTHUR J. KARNUTH, United States Director of Immigration, and CHARLES DREHER, Inspector in Charge United States Immigration Service,<br>Petitioners,<br>v.<br>UNITED STATES OF AMERICA, on the Petition of PRESTON M. ALBRO, an attorney, for Mary Cook and Antonio Danelon,<br>Respondents. | = 198. |

## RESPONDENTS' MOTION FOR REARGUMENT.

AND NOW COME RESPONDENTS, Mary Cook and Antonio Danelon, by Preston M. Albro, their attorney, and pray for a rehearing and reargument, upon the grounds more particularly set forth in the Memorandum attached hereto.

Dated at Buffalo, N. Y., this 29th day of April, 1929.

PRESTON M. ALBRO,
Attorney for Petitioners-Respondents,
925 M. & T. Bldg.,
Buffalo, N. Y.

## MEMORANDUM IN SUPPORT OF MOTION.

### POINT I.

**We respectfully submit that the meaning of the term "business" as adopted herein by the Court does not conform to the previous definitions approved by it, and further leads to a situation in the interpretation of the Immigration Act not foreseen nor contemplated.**

While we fully appreciate that the present case directly involves only non native Canadians, we feel that the matter is of such importance that the possible result of the Court's decision should be called to its attention at this time by this proceeding.

The points we desire to stress are—that under the Court's decision

**A. All aliens including native Canadians would be barred from temporarily entering the United States in the pursuit of non-commercial vocations.**

**B. Native Canadians would be barred from entering the United States daily for labor for hire, if they remain domiciled in Canada.**

It is true that in *Bloom* v. *Richards*, 2 Ohio St. 387, 396, it was held as stated in the opinion herein that though labor may be business, it is not necessarily so, and the converse is equally true, that business is not always labor. In that case a statute was under consideration prohibiting "labor" on Sunday, and it was held that the drawing of a legal document was not a violation of the statute. The statute was of course framed for the purpose of the quiet observance of one day in seven in order to give laborers a day of rest. The decision, however, in that case does not state, nor does it even intimate, that labor for the purpose

of gaining a livelihood is not "business," although it intimates that labor is a narrower term.

The word business was not used in the Ohio statute under consideration, but its meaning was discussed because similar statutes of other states added the term "business" after the word "labor." The fact that it was omitted in the Ohio statute was considered by the Court as significant, and as stated, the drawing of a contract was not held to be violative of the statute prohibiting "labor." The definition of the word business therefore seems not to have been directly involved.

We submit, that the correct rule was stated BY THIS COURT in 1910 when in the case of *Flint v. Stone Tracy Co.*, 220 U. S. 107, the Court, on page 171, stated:

> "'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dictionary, 158, citing *People v. Commissioners of Taxes*, 23 N. Y. 242, 244: 'That which occupies the time, attention and labor of men for the purpose of livelihood or profit * * * It embraces everything about which a person could be employed * * *' Bouvier's Law Dictionary, Vol. 1, p. 273."

We respectfully call the Court's attention to respondents' original brief, pages 7 to 9.

The last paragraph of the opinion of the Court herein defines "BUSINESS" within the meaning of Section 203 (2), 8 U. S. C. A., as follows:

> "The word business as here used, must be limited in application to intercourse of a commercial character."

We appreciate that the Court in construing the word "business" as used in the Immigration Act sought to adopt a meaning which it deemed consistent with Congressional intent, as it believed that intent to be when the Acts of 1921 and 1924 were adopted; we do submit, however, that in departing, as we contend, from the ordi-

nary legal definitions of the word "business" the opinion of the Court will necessarily give rise to the situation outlined below, which would not arise had "business" been construed according to its usual meaning.

We believe that if we had called this to the Court's attention originally, the Court might not have held, as it did, that Congress in enacting Section 203, 8 U. S. C. A., intended to give a new or altered meaning to the term "immigrant" other than the definition theretofore generally recognized.

We respectfully submit that under this narrower definition of the word "business" adopted by the Court in its opinion, the following probably unintended and uncontemplated conditions will arise:

**1. All aliens including native Canadians would be barred from temporarily entering the United States in the pursuit of non-commercial vocations.**

No engineer, artist, actor, preacher, scientist or member of any of the professional classes could enter the United States for the temporary pursuit of his calling for compensation, as such business is not "Intercourse of a Commercial Character" within the opinion of this Court.

> (To avoid confusion, we desire to state here that this does not concern the permanent immigration as non-quota immigrants under Section 204 (d), 8 U. S. C. A., of a limited class of ministers and professors, nor with the exception of most of the classes described above from the operation of Section 136 (h), 8 U. S. C. A., as "contract laborers.")

**2. Native Canadians would be barred from entering the United States daily for labor for hire, if they remain domiciled in Canada.**

The decision of this Court specifically holds that labor for hire is not "business" within the meaning of the ex-

ception of the term "immigrant" in Section 203 (2), 8 U. S. C. A.

It also holds expressly in the paragraph beginning with the word "Second" that for that reason the relators herein must be classified as "IMMIGRANTS."

Aliens desiring to emigrate from a foreign country to the United States, whether Canadian born or otherwise, must possess themselves of immigration visaes and cannot be admitted to the United States unless they (1) "Have an unexpired immigration visa" (Sec. 213 (a), 8 U. S. C. A.).

The only advantage native Canadians have is that the issuance of immigration visaes in such cases is not numerically limited.

In every other respect, the Canadian of native birth is subject to all rules and statutory requirements prescribed for all other aliens. Thus he must pay a $10 fee for his visa (Sec. 202 (h), 8 U. S. C. A., and Sec. 207 (b), 8 U. S. C. A.) and the $8 head tax (Sec. 132, 8 U. S. C. A.).

The native Canadian must also EMIGRATE from the country whence he comes, and IMMIGRATE to the United States; that is, in order to be entitled to the privilege of returning from abroad as "an alien previously lawfully admitted" under Section 204 (b), 8 U. S. C. A., he must have definitely ABANDONED his domicile in Canada and established a new BONA FIDE DOMICILE in the United States.

If such a native Canadian who comes for work or employment only (temporarily or as commuter) is admitted as an "IMMIGRANT" and departs at the end of his daily or periodic employment to resume his domicile in the Dominion, he thereby abandons his status as a resident of the United States, and forfeits his right to re-enter under Section 204 (b), 8 U. S. C. A.

Hence, upon his reapplication the following day or week, he would be again required to produce an unexpired immigration visa and pay a new head tax.

Aliens previously lawfully admitted to the United States, leaving the country for temporary visits abroad,

are entitled to re-enter if, pursuant to Section 213 (b), 8 U. S. C. A., they are equipped with either:—

(a) a non-quota visa under the provisions of Section 204 (b), 8 U. S. C. A., or

(b) a return permit under Section 210, 8 U. S. C. A.

To obtain either of these documents, the State and Labor Departments require proof of unrelinquished residence in the United States.

In the well reasoned case of *Serpico* v. *Tendell*, U. S. Daily, December 23, 1928, an alien secured re-entry only because the District Judge found that as a fact the alien's residence had not been relinquished, notwithstanding protracted absence, and that therefore as a matter of law he was entitled to re-enter.

Only if he in good faith established a legal and actual residence in the United States is a native Canadian entitled to the privilege of "returning from a temporary visit abroad." The use of the word "visit" as applied to one leaving the United States for the Dominion in itself negatives the maintaining of a domicile in Canada, and in effect prohibits a native Canadian with a *bona fide* residence in Canada from daily entering for employment.

In support of these statements, we quote from the rules of the respective Departments:

General Instructions Consular 926, p. 34 (issued by authority of Sec. 224, 8 U. S. C. A.):

129. After an absence the burden of proof is on the returning alien to show

(a) That he was previously lawfully admitted to the United States;

(b) That he went abroad with the intention of returning to reside in the United States;

(c) That he has an established domicile in the United States.

* * * * * *

Immigration Laws and Rules, March 1, 1927, Rule 24, subdivision B, page 151.

This rule deals with application for return permits under Section 210, U. S. C. A., and requires the applicant to show

> * * * (3) place of residence in the United States, and the length of such residence;
>
> * * * * * *

and also refers therein to an alien claiming the right to obtain such a permit as "an alien previously lawfully admitted to the United States *for permanent residence*." The general rule is that in the interpretation of statutes, the rules of construction placed thereon by the Government departments concerned are entitled to great weight.

Under the Act of 1921, the Secretary of Labor established a rule (2a) that "temporary absence" shall be construed to mean "an absence in any foreign country (*without relinquishment of domicile*) not exceeding six months in duration," and this rule has been held reasonable (*U. S.* v. *Tod*, 297 Fed. 214; see also *Hee Fuk Yuen* v. *White*, 273 U. S. 639; *MacKusick* v. *Johnson*, 3 Fed. [2nd] 398).

The rules of the State and Labor Departments were undoubtedly adopted with reference to Section 225, 8 U. S. C. A., which makes the 1924 Act an Act supplemental to the 1917 Act. The title of the 1917 Act is "AN ACT TO REGULATE THE IMMIGRATION TO AND RESIDENCE OF ALIENS IN THE UNITED STATES."

> (For the sake of clarity and to avoid misunderstanding, we desire to further add that aliens previously lawfully admitted returning from a temporary visit abroad during which they have not been elsewhere than in contiguous territory are, by executive order, exempted from producing the documents mentioned above, a waiver authorized by Section 213 (b), 8 U. S. C. A. This exempts such aliens merely from the procedural necessity of procuring the documents; they must still prove on entry that they comply with the basic requirement, namely,

they must be found to be returning to an unrelinquished domicile. Substantive requirements could of course not be waived under the section cited *ante*. In the case of aliens habitually crossing the border, subdivision Q of Rule 3, Immigration Laws and Rules, *ante*, page 109, provision is made for identification cards "with a view to avoiding delays and embarrassment"; but in such case requirement is made that they must be crossing "upon legitimate pursuits," which would not avail a native Canadian, unless otherwise admissible under the Immigration Act.)

These consequences of the definitions of "business" and "immigrant" established by the Court's opinion were not specifically brought to the Court's attention upon the argument, or in the briefs; and it is respectfully urged that an opportunity to present them fully be afforded by means of a reargument, before the entire subject of immigration is thus revolutionized, and further restrictions apparently neither urged nor even contemplated by the Attorney General made effective by logical necessity.

Respectfully submitted,

PRESTON M. ALBRO,
Attorney for Respondents.

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**Certificate of Counsel.**

I have prepared and read the foregoing motion for rehearing in this cause and hereby certify that I believe the same to be meritorious; that it is made in good faith and not for the purpose of delay.

PRESTON M. ALBRO,
Attorney for Respondents.